

Chian Swee Ong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-44 OF 2006

TENGKU BAHARUDDIN SHAH, HASAN LAH AND JEFFREY TAN
JJCA
19 OCTOBER 2009

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*Criminal Law — Penal Code — s 300 — Murder — Appeal against conviction
and sentence — Circumstantial evidence — Whether led to irresistible conclusion
that appellant murdered victim — Whether trial judge erred in finding that
prosecution had made out prima facie case against appellant — Whether
appellant established loss of self control due to grave and sudden provocation on
balance of probabilities — Penal Code ss 300 & 302*

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*Evidence — Statement — Cautioned statement — Whether cautioned statement
rightly admitted in evidence — Criminal Procedure Code s 113*

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On 17 December 2002, the appellant, surrendered himself to the police after admitting to having committed a crime. At the police station he handed over to the police officers the keys to a double storey house at 11A Jalan USJ ('the house'). In the house, the police discovered the body of a highly decomposed nude female ('the victim') lying on a mattress on the floor of the hall. Among the things recovered at the scene of the crime was a dagger with its sheath ('the dagger') and a photostat copy of a passport under the name of 'Venera Ziatdinova' from Uzbekistan. There was no evidence of the house being broken into and the police were unable to confirm with any certainty that the decomposed body of the victim was in fact that of Venera Ziatdinova. The appellant was originally charged with the murder Venera Ziatdinova but the charge was later amended. The amended charge differed from the original charge only to the extent that the identity of the victim was not ascertained and under the amended charge the accused was charged with the death of a human being under s 300 of the Penal Code ('the Code'). At the trial, the doctor who performed the post-mortem on the victim's body testified that the cause of death was the stab wounds on the chest of the victim. The doctor also testified that the 11 stab wounds could have been inflicted with a weapon such as the dagger found near the victim. The government chemist testified that the dagger had blood stains which matched the DNA profile of the victim. The appellant's cautioned statement recorded under s 113 of the Criminal Procedure Code was also admitted in evidence. At the close of the

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- A prosecution's case the trial judge ruled that the prosecution had made out a prima facie case against the appellant and called upon the appellant to enter his defence. The appellant who elected to give evidence on oath testified that he did not plan to murder the victim, a prostitute whom he had regularly visited for her services and had allegedly fallen in love with, when he brought her to his house on 13 December 2002. The appellant also testified that upon seeing and hearing the victim's humiliating and mocking response to his expression of love for her he had lost control of himself and stabbed her with the knife that he had used to actually cut his own hand to prove his love for her. It was the appellant's defence that he had stabbed the victim as a result of a grave and sudden provocation. The appellant was convicted and sentenced to death by the High Court. This was the appellant's appeal against that conviction on the grounds that the trial judge had erred in finding that the prosecution had made out a prima facie against him and in not making a finding that the appellant had lost his self control due to the grave and sudden provocation from the victim. The appellant submitted that his cautioned statement was wrongly admitted in evidence because s 113 of the CPC had not been complied with. The appellant also submitted that the trial judge had not subjected the totality of the evidence contained in the prosecution's case to a maximum evaluation.
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Held, dismissing the appeal:

- F (1) In the present case no trial within a trial was held to determine the admissibility of the appellant's cautioned statement as it was not objected to by the defence. Further it was recorded in the appellant's cautioned statement that the appellant had replied that he had understood the caution read to him by the police officer recording the statement (recording officer). As such, there was evidence to show that the proper caution as prescribed under s 113 of the CPC had been administered by the recording officer before the said statement was recorded and that therefore the cautioned statement had been properly admitted by the trial judge (see paras 26, 30–32).
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- H (2) However, it was clear that even if the cautioned statement was not admitted the cumulative effect of all the circumstantial evidence led to the irresistible conclusion that it was the appellant who had murdered the victim. The appellant was charged with the murder of a human being whose identity was not ascertained because the investigating officer could not determine whether the dead body was in fact the body of Venera Ziatdinova. Under the circumstances, what the prosecution was required to prove under s 300 of the Code was the death of a human being and this they did. In any event, at the close of the entire case there could be no doubt that the victim was indeed Venera
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Ziatdinova. As such the trial judge had not misdirected himself on the law or facts in deciding that the prosecution had made out a prima facie case against the appellant for the offence of murder within s 300(c) of the Code (see paras 36, 38, 39–40).

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- (3) It is trite law that for the appellant to succeed in his defence he had to show that on a balance of probabilities he had killed the deceased while he was deprived of the power of self control by grave and sudden provocation. In his judgment, the trial judge found there was no reason for the appellant to be emotional or to lose self-control over the victim's rejection of his love when the relationship they shared was one of prostitute and client. The trial judge's findings that the alleged provocative acts, such as the victim's mocking laughter or conduct, were incapable of constituting grave and sudden provocation were supported by the evidence and an appellate court would be slow to disturb such findings of fact (see paras 42, 45–47).

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[Bahasa Malaysia summary]

Pada 17 Disember 2002, perayu, menyerah diri kepada pihak polis setelah mengaku melakukan jenayah. Di balai polis tersebut, dia menyerahkan kunci-kunci rumah dua tingkat di 11A Jalan USJ ('rumah tersebut') kepada pegawai-pegawai polis. Dalam rumah tersebut, polis menjumpai mayat seorang perempuan bogel yang sudah reput ('mangsa') terlantar atas tilam di lantai ruang depan. Antara barangan yang dijumpai di tempat kejadian jenayah adalah pisau belati dengan sarungnya ('pisau belati') dan salinan fotostat pasport di bawah nama 'Venera Ziatdinova' dari Uzbekistan. Tiada bukti rumah tersebut dipecah masuk dan polis tidak dapat mengenalpasti bahawa mayat mangsa yang sudah reput itu adalah Venera Ziatdinova. Pelayu pada asalnya dituduh dengan pembunuhan Venera Ziatdinova tetapi tuduhan ini kemudiannya dipinda. Tuduhan pindaan adalah berbeza dengan yang asal setakat pengenalan mangsa yang tidak dapat dipastikan dan di bawah tuduhan pindaan tersebut tertuduh dituduh dengan kematian seorang manusia di bawah s 300 Kanun Keseksaan ('Kanun'). Semasa perbicaraan, doktor yang menjalankan post-mortem ke atas mayat mangsa memberi keterangan bahawa sebab kematian adalah luka-luka tikaman di dada mangsa. Doktor tersebut memberi keterangan bahawa 11 luka-luka tikaman tersebut mungkin disebabkan oleh senjata seperti pisau belati yang dijumpai berdekatan mangsa. Ahli kimia kerajaan memberi keterangan bahawa pada pisau belati tersebut ada kesan darah yang menyamai profil DNA mangsa. Pernyataan beramaran perayu yang dicatatkan di bawah s 113 Kanun Prosedur Jenayah ('KPJ') juga dimasukkan sebagai keterangan. Pada penutup kes pendakwaan, hakim bicara memutuskan bahawa pendakwaan berjaya membuktikan kes prima facie terhadap perayu dan mengarahkan pembelaan membela diri. Pelayu yang memilih untuk memberikan keterangan

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- A bersumpah menyatakan bahawa dia tidak merancang untuk membunuh mangsa, seorang pelacur yang biasa dilangganinya dan mendakwa telah jatuh cinta kepadanya, apabila dia membawa mangsa itu ke rumahnya pada 13 Disember 2002. Perayu juga memberi keterangan bahawa apabila melihat dan mendengar hinaan dan ejekan mangsa apabila dia meluahkan isi hatinya,
- B dia hilang kawalan dan menikam mangsa dengan pisau yang telah digunakannya untuk mencederakan tangannya bagi membuktikan cintanya pada mangsa. Adalah merupakan pembelaan perayu bahawa dia menikam mangsa disebabkan oleh bangkitan marah besar dan mengejut. Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi. Ini merupakan rayuan perayu terhadap sabitan tersebut atas dasar bahawa hakim bicara telah khilaf dalam penemuan bahawa pendakwaan telah berjaya membuktikan kes prima facie terhadapnya dan apabila tidak membuat penemuan bahawa perayu telah hilang kawalan akibat daripada bangkitan marah besar dan mengejut daripada mangsa. Perayu berhujah bahawa pernyataan beramarannya telah salah dimasukkan sebagai keterangan kerana s 113 KPJ telah tidak dipatuhi. Perayu juga menyatakan bahawa hakim bicara tidak meneliti secara maksimum keseluruhan keterangan yang terdapat dalam kes pendakwaan.

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Diputuskan, menolak rayuan:

- (1) Dalam kes ini, tiada perbicaraan dalam perbicaraan dibuat untuk menentukan penerimaan pernyataan beramaran perayu oleh sebab ia tidak dibantah oleh pembelaan. Selanjutnya, telah tercatat dalam
- F pernyataan beramaran perayu bahawa perayu menyatakan bahawa dia memahami amaran yang dibacakan kepadanya oleh pegawai polis yang mencatat pernyataan tersebut ('pegawai pencatat'). Oleh itu, terdapat keterangan yang menunjukkan bahawa amaran yang berpatutan telah diberikan oleh pegawai pencatat, seperti yang diperuntukkan di bawah
- G s 113 KPJ sebelum pernyataan tersebut dicatatkan dan bahawa pernyataan beramaran tersebut telah diterima dengan sepatutnya oleh hakim bicara (lihat perenggan 26 & 30–32).
- (2) Namun, adalah jelas bahawa walaupun pernyataan beramaran tersebut tidak diterima, kesan kumulatif kesemua keterangan keadaan menjurus kepada kesimpulan bahawa perayu yang telah membunuh mangsa. Perayu dituduh membunuh seorang manusia yang identitinya tidak dapat dipastikan kerana pegawai penyiasat tidak dapat menentukan sama ada mayat tersebut merupakan mayat Venera Ziatdinova. Dalam
- H keadaan-keadaan ini, apa yang perlu dibuktikan oleh pendakwaan di bawah s 300 Kanun adalah kematian seorang manusia dan itulah yang telah dibuktikan. Apa jua pun, pada penutup keseluruhan kes tersebut, hakim bicara tidak salah arah dari segi undang-undang atau fakta-fakta dalam memutuskan bahawa pendakwaan telah membuktikan kes prima
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- facie terhadap perayu atas kesalahan membunuh di bawah s 300(c) Kanun (lihat perenggan 36, 38, 39–40). A
- (3) Adalah undang-undang tetap bahawa untuk perayu berjaya dalam pembelaannya, dia perlu menunjukkan, atas imbalan kebarangkalian, bahawa dia membunuh mangsa ketika dia hilang kawalan dirinya disebabkan oleh bangkitan marah besar dan mengejut. Dalam penghakimannya, hakim bicara mendapati bahawa tiada sebab bagi perayu beremosi atau hilang kawalan diri kerana cintanya ditolak oleh mangsa apabila hubungan mereka adalah hubungan antara pelacur dan pelanggan. Penemuan-penemuan hakim bicara terhadap perilaku provokatif tersebut, seperti tawa ejekan dan tindak tanduk mangsa, tidak membawa kepada bangkitan marah besar dan mengejut telah disokong oleh keterangan dan mahkamah rayuan akan teragak-agak untuk mencampuri penemuan fakta tersebut (lihat perenggan 42, 45–47).] B
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Notes

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2385–2402.

For cases on s 300 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1497. E

Cases referred to

- Bala anak Matik v PP* [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)
- Chan Chwen Kong v PP* [1962] MLJ 307, CA (refd) F
- Chow Kok Keong v PP* [1998] 2 MLJ 337, FC (refd)
- Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232, FC (refd)
- Dato' Seri Anwar bin Ibrahim v PP* [2002] 3 MLJ 193, FC (refd)
- Francis Anthonysamy v PP* [2005] 3 MLJ 389, FC (refd)
- Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd) G
- Lorensus Tukan v PP* [1988] 1 MLJ 251, SC (refd)
- Parlan bin Dadeh v PP* [2008] 6 MLJ 19, FC (refd)
- Poon Heong v PP* [1949] MLJ 114, HC (refd)
- PP v Badrulsham bin Baharom* [1988] 2 MLJ 585, HC (refd) H

Legislation referred to

- Criminal Procedure Code s 113, 113(1)(b)(ii)
- Dangerous Drugs Act 1952 s 37A(1)
- Emergency Regulations 1948 reg 33
- Penal Code ss 46, 300, 300(c), Exception 1, 302 I
- Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.*
- Melissa bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

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Hasan Lah JCA:

INTRODUCTION

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[1] The appellant was charged under s 302 of the Penal Code. He was convicted and sentenced to death. We heard his appeal on 25 May 2009 and dismissed it. We now give our reasons.

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[2] The original charge preferred against the appellant was as follows:

Bahawa kamu pada 13hb Disember 2002, di antara jam lebih kurang 5 pagi, di No 11A, Jalan USJ 13/5B, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah melakukan kesalahan membunuh, iaitu menyebabkan kematian ke atas Venera Ziatdinova (Passport No CA 1713998) dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

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[3] At the close of the case for the prosecution the charge against the appellant was amended as follows:

Bahawa kamu pada 13 Disember 2002, pada jam lebih kurang 5 pagi, di No 11A, Jalan USJ 13/5B, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah melakukan kesalahan membunuh, iaitu telah menyebabkan kematian seorang manusia yang mana identitinya tidak dikenalpasti dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

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[4] The said amended charge differed from the original charge only to the extent that the victim was identified by name in the original charge but in the amended charge the identity of the victim was not ascertained.

FACTS OF THE CASE

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[5] The material facts of the case as could be gathered from the notes of the proceedings and the facts as found by the learned High Court judge are as follows. On 17 December 2002 at about 6pm L/Kpl RA Hirudhayaddass ('PW2') received a call from one Mr Lee ('the appellant's counsel') who informed him that a Chinese lady ('PW6') had brought her brother who allegedly had committed a crime. Within five minutes after that PW2 proceeded to a car-wash centre at Jalan Dato Hamzah in Klang and upon his arrival he was approached by PW6 and the appellant. PW6 told PW2 that the appellant had committed a crime and that the appellant was his brother.

[6] PW2 examined the appellant's body and found there was an injury on his left chest which had been treated. PW2 also observed there were scratch marks on the appellant's hand. PW2 arrested the appellant and brought him back to Balai Polis, Klang and handed him to ASP Mohd Sukri bin Kamar ('PW4').

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[7] At the Balai Polis Klang the appellant handed over a bunch of keys to PW4 and the keys were for a house at No 11A, Jalan USJ 13/5B ('the said house'). PW4 proceeded to the said house with the appellant. When they arrived there they were met by Insp Jamil bin Osman ('PW5') who was already there. The said house was a double-storey terrace house. The windows of the house and the front door were locked. PW4 gave the keys to PW5 who then opened the front door with one of the keys.

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[8] PW5 saw the body of a nude female in the hall. PW5 then informed ASP Ahmad Fauzi bin Mohamad Zin, senior investigating officer, IPD Shah Alam ('PW14') about the discovery.

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[9] PW14 went to the said house and entered the said house together with PW5. Inside the said house PW14 saw a nude body lying on a mattress on the floor in the hall. On a comforter, near the dead body, PW14 found a dagger with its sheath (exhs P11 and P10), a box of tissue (exh P24A), a pair of spectacles and its case (exhs P25A and P25B) and several other items. Near the toilet he found a blouse, a brassier, a panty and a pair of jeans. In a plastic bag, near the toilet, SP14 found a photostat copy of a passport under the name of 'Venera Ziatdinova' from Uzbekistan (exh P29).

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[10] PW14 was not 100% sure that the dead body was in fact that of 'Venera Ziatdinova' named in exh P29 as it was highly decomposed. There was no identification or verification of the name by any possible relatives of the deceased. The Uzbekistan Embassy confirmed that a passport had been issued to one 'Ziatdinova' and she was an Uzbekistan citizen. PW14 did not find any evidence of the house having been broken into.

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[11] On 18 December 2002 Dr Mohammad Shafie bin Othman @ Osman (PW9) performed a post-mortem on the said body at Tengku Ampuan Rahimah Hospital, Klang. PW9 testified that the body was that of a female, decomposed and maggot infested. He estimated the death to have occurred between three to ten days prior to the date of post-mortem. According to PW9 the cause of death was stab wounds on the chest. He prepared a post-mortem report (exh P8). He testified that there were 11 stab wounds on the body of the deceased, and five of them had penetrated the chest wall. He also testified that the stab wounds could have been inflicted with a weapon like exh P11.

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A [12] Primulapathi a/l Jaya Krishnan ('PW13'), the government chemist, testified that the dagger (exh P11) had blood stains which matched the DNA profile of the deceased. PW13 also found that the blood stains on the handphone, the spectacle and the jeans (which were recovered by PW14 in the living room of the said house) matched the DNA profile of the appellant.

B [13] On 18 December 2000 at about 3.50pm, K/I Ang Hock Ling ('SP10') recorded a cautioned statement under s 113 of the Criminal Procedure Code from the appellant. The cautioned statement was admitted and marked as exh P16 and its transcript was marked as P16T after counsel for the appellant did not object to it.

C [14] At the close of the prosecution's case learned counsel for the appellant elected not to make a submission of no case to answer, as he was satisfied, on the evidence adduced by the prosecution, and having had the opportunity to read the written submission of the learned deputy public prosecutor, the prosecution had in fact made out a prima facie case on the amended charge.

D [15] The learned High Court judge ruled that the prosecution had made out a prima facie case against the appellant.

THE DEFENCE

E [16] The appellant elected to give evidence on oath. In his evidence he said that he met a female Russian, known as Sarah to him, at the Spa Liza De Inn, Petaling Jaya in August 2002. He knew that her name in her passport was Venera Ziatdinova. When the appellant first met Sarah there she was working as a prostitute, with the dignified job designation of GRO ('guest relations officer'). He became one of her clients. There were times when he took her out for her service. He either took her to a hotel or to his house to have sex.

F [17] He began to fall in love with Sarah. He had proposed marriage to her in October 2002 and she agreed to marry him and told him to wait.

G [18] In November 2002 Sarah started working in a different entertainment centre, known as Kim Lady, in Puchong as a GRO. He said he went daily to Kim Lady, after his work, to see Sarah as his feelings for her became more intense.

H [19] On 12 December 2002, the appellant went to see Sarah at Kim Lady at about 8pm. On that day he had proposed marriage to her and requested her to stop working in order to marry him. Sarah got angry with him and he slapped her. Sarah retaliated and slapped him. The appellant then returned

home but went back again to Kim Lady at about 3am (on 13 December 2002). He took Sarah to his house ie the said house, and they arrived at the said house at about 4am.

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[20] At his house he expressed his feelings and love for her, and had sex with her, that morning, in the hall of his house. He told her that, he was willing to sacrifice his life for her. He then swallowed 19 'UPHAMOL' pills in front of her in order to prove to her, he meant what he had said. He claimed Sarah laughed at him when he swallowed the pills. He then took out a dagger (exh P11) and cut his hand four or five times with it, in front of Sarah. Again, the appellant claimed Sarah laughed at him and accused him of having cheated her, as it was all a mere act by the appellant. Sarah told him that she had come to Malaysia, not because of her love for him, but to earn money and she wanted to earn more money. All along she had been good to him because of the monetary return to her from her sexual services to him. The appellant said he had spent about RM20,000 for Sarah's sexual services to him.

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[21] The appellant testified that upon seeing and hearing Sarah's cold, humiliating and mocking response to his expression of love for her, he lost control of himself. He then stabbed Sarah with the knife which was in his hand. Sarah attempted to defend herself using her hand and she broke his spectacles. The incident happened very fast and he was not sure what really happened. Sarah fell on the floor. The incident took place in the hall.

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[22] The appellant testified that he did not plan to murder Sarah when he brought her to his house on 13 December 2002. He surrendered himself to the police because he had committed an offence and wanted to be responsible for that.

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GROUNDS OF APPEAL

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[23] At the hearing of the appeal before us, learned counsel for the appellant relied on two main grounds of appeal and they are as follows:

- (a) the prosecution had failed to make out a prima facie case against the appellant; and
- (b) the appellant had established the defence of grave and sudden provocation.

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DECISION OF THE COURT ON APPEAL

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[24] On the first issue learned counsel for the appellant submitted that the cautioned statement of the appellant (exh P16) was wrongly admitted in

A evidence by the learned High Court judge. It was contended that the caution administered under s 113 of the Criminal Procedure Code by PW10, the recording officer, was defective in that it did not include the phrases 'or to answer any question but anything you, whether in answer to a question or not'. In support of that learned counsel for the appellant cited the following cases:

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- (a) *Poon Heong v Public Prosecutor* [1949] MLJ 114;
- (b) *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; and
- (c) *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389.

[25] With regard to the concession made by the defence counsel in the High Court on the admissibility of exh P16 learned counsel submitted that the concession made therein could be reopened for further argument on the ground that the evidence had shown that s 113 of the Criminal Procedure Code was not complied with. Two cases were cited in support of that proposition and they are:

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- (a) *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; and
- (b) *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19.

[26] We would deal with these issues now. We agree with the submission of learned counsel for the appellant that notwithstanding the concession made by the defence counsel the learned High Court judge must be satisfied that the provision of s 113 of the Criminal Procedure Code was complied with before admitting exh P16 as evidence for the prosecution. It is trite law that in a criminal case the burden lies with the prosecution to prove its case beyond reasonable doubt. With regard to the caution required under the old s 113(1)(b)(ii) of the Criminal Procedure Code the court must be satisfied that the caution that was administered was as prescribed or contained words to the like effect.

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[27] In *Poon Heong v Public Prosecutor* the Court of Appeal held the omission of the phrase 'or to answer any question ... whether in an answer to a question or not' in reg 33 of the Emergency Regulations 1948 (which is in pari materia with s 113 of the Criminal Procedure Code) in the caution administered by the recording officer rendered the cautioned statement inadmissible.

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[28] In *Public Prosecutor v Badrulsham bin Baharom* Lim Beng Choon J followed the decision in *Poon Heong's* case and held that the omission of the words 'to answer any question' in the caution administered by the recording

officer under the proviso to s 37A(1) of the Dangerous Drugs Act 1952 (in pari materia with s 113 of the Criminal Procedure Code) rendered the caution defective in law.

[29] In *Francis Anthonymsamy v Public Prosecutor* the evidence of the recording officer in respect of the caution that he administered was only that he read the caution under s 113 of the Criminal Procedure Code. The actual words of the caution that was administered are as stated in the cautioned statement itself. At p 399 the Federal Court, through Augustine Paul JCA, said:

... It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. *In any event he did not say that the caution that he read is as recorded in the cautioned statement.* (Emphasis added.)

[18] The result is that there is no evidence before the court in order to be 'satisfied' whether the caution that was administered is as prescribed or contain words to the like effect.

[30] In the present case no trial-within-trial was held to determine the admissibility of the appellant's cautioned statement as it was not objected to by the defence. In his evidence SP10, the recording officer, said:

Sebelum merakamkan percakapannya, saya ada memberi amaran kepadanya. Amaran tersebut 'adalah menjadi kewajipan saya untuk memberi amaran kepada kamu apa-apa kamu ceritakan kepada saya akan menjadi satu keterangan di Mahkamah'. Saya ada memberitahu beliau dalam amaran tersebut bahawa beliau tidak diwajibkan untuk menyatakan apa-apa. Beliau faham amaran itu.

[31] In the notes of the proceedings at p 47 of the appeal record it was recorded by the learned High Court judge that SP10 read out the contents of exh P16 in open court. In the second page of the cautioned statement (exh P16) SP10 recorded as follows:

... saya telah membacakan amaran di dalam Bahasa Malaysia di bawah Sek. 113 KAJ yang berbunyi seperti berikut:

Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, sama ada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan.

A [32] It is to be noted that the caution as stated in the cautioned statement is in compliance with s 113 of the Criminal Procedure Code. PW10 recorded in exh P16 that the appellant replied that he understood the caution read to him by PW10. As such we are of the view that there are evidence to show that the proper caution as prescribed under s 113 of the Criminal Procedure Code was administered by PW10 before recording the statement from the appellant. We are therefore satisfied that exh P16 had been properly admitted by the learned High Court judge.

C [33] Learned counsel for the appellant also submitted that the learned High Court judge appeared not to have examined the evidence of the prosecution witnesses to a maximum evaluation to decide on their credibility to determine whether a prima facie case had been made out. In this connection learned counsel referred to the decision of this court in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 where it was held, inter alia, that:

E Under s 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a prima facie case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no prima facie case has been made out, and the accused is entitled to an acquittal.

G [34] The other complaint made by learned counsel for the appellant before us was that the learned High Court judge took into consideration the evidence of PW4, ASP Mohd Sukri bin Kamar, who testified that the appellant informed him that he had a female friend from Uzbekistan and that based on the information given by the appellant and guided by the appellant he ('PW4') proceeded to the said house. It was the contention of learned counsel for the appellant that the evidence was inadmissible. Furthermore the learned High Court judge did not direct his mind to the amended charge which says 'menyebabkan kematian seorang manusia, yang mana identitinya tidak dikenalpasti (caused the death of someone whose identity was not ascertained)'.

I [35] We have carefully considered the grounds of judgment of the learned High Court judge. In our view the learned High Court judge had examined and analysed the relevant evidence of the witnesses for the prosecution to a maximum evaluation in accordance with the principle as stated in *Looi Kow Chai's* case. It must be noted that the evidence of the witnesses for the prosecution was not challenged by the defence. The learned High Court

judge had carefully set out the relevant evidence of the witness for the prosecution which were not challenged in his grounds of judgment. With regard to the contention that part of the evidence of PW4 is inadmissible it is to be observed that without those evidence the prosecution through the evidence of PW1 and PW6 had proved that the appellant was the sole occupant of the said house.

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[36] It is clear that without exh P16 the prosecution had to rely on the circumstantial evidence to prove its case against the appellant. It is trite law that the prosecution must show that the cumulative effect of all the circumstantial evidence leads to the only irresistible conclusion that the appellant committed the crime. With regard to this Abdoolcader FJ made the following observation in *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at p 275:

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Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors v Public Prosecutor* (45)).

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In *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 Thomson CJ said at p 307:

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not, only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

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[37] It is therefore important at this stage to look at the circumstantial evidence adduced by the prosecution in this case as found by the learned High Court judge to see whether this test has been satisfied in the case against the appellant. A dead body was found inside the said house after the appellant brought the police to the said house. The evidence given by the appellant's sister and his neighbour showed that the appellant was the sole occupant of the said house. The police obtained the keys to the said house from the appellant.

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[38] In the living room inside the said house the police recovered several material items such as the murder weapon (exh P11), a Nokia-brand hand phone (exh P19A), a JAWS-brand black bow (exh P20A), a box of tissues

- A beside the dead body (exh P24A), a pair of spectacles and its case (exh P25A) and near the toilet PW5 recovered several items including a pair of jeans and a photostat copy of an Uzbekistan passport in the name of 'Venera Ziatdinova' (exh P29). It is to be observed that the blood on the murder weapon and the tissues were found to have generated from the deceased's
- B body whilst the hand phone, the black box, the spectacles and the jeans all bore the appellant's blood. SP9 who performed a post-mortem on the deceased body testified that the body was of a woman who was nude. According to PW9 there were 11 stab wounds, five of which had penetrated the chest cavity and six were superficial. There were numerous defensive
- C wounds on both of the deceased's hands and arms. The five stab wounds that had penetrated the chest cavity had penetrated both sides of the deceased's lung structure and her heart. These injuries were found to be the cause of her death. These wounds were consistent with injuries caused by a knife like exh
- D P11. In our view the injuries caused by the stab wounds that had penetrated both sides of the deceased's lung structure and her heart were sufficient in the ordinary course of nature to cause her death. PW10 who examined the appellant's body on 18 December 2002 before he recorded the cautioned statement from the appellant testified that there were injuries to the
- E appellant's body ie '11 bekas tikaman kecil'. PW2, who arrested the appellant on 17 December 2002, found there was an injury on the appellant's left chest and scratch marks on the appellant's hand.

- [39] One thing peculiar about the amended charge against the appellant is that the victim's identity was not ascertained by the prosecution. The
- F appellant was charged with the murder of a human being whose identity was not ascertained. PW14, the investigating officer could not determine whether the dead body was in fact the body of 'Venera Ziatdinova'. The learned High Court judge did consider this aspect of the prosecution evidence in his
- G grounds of judgment. In our view, notwithstanding the fact that the identity of the deceased was not ascertained by the witnesses for the prosecution the facts remain that a human being had been killed. Section 300 of the Penal Code provides that culpable homicide is murder where death is caused under any one of the circumstances stated therein and s 46 of the Penal Code
- H defines death 'as the death of a human being'. What is required to be proved under s 300 of the Penal Code is the death of a human being. This was proved by the prosecution. In any event, at the close of the entire case, with the evidence of the appellant that the victim was Sarah who was also known to him as Venera Ziatdinova and with the recovery of a photostat of a
- I passport in the name of Venera Ziatdinova near the body, there could be no doubt that the deceased was indeed Venera Ziatdinova.

[40] Having carefully considered the evidence adduced by the prosecution and the submissions made by the parties we are satisfied that, even without

exh P16, the cumulative effect of all the circumstantial evidence in the present case leads us to the only irresistible conclusion that it was the appellant who murdered the deceased. As such it is our finding that the learned High Court judge had not misdirected himself in law and in facts in deciding that the prosecution had made out a prima facie case against the appellant for the offence of murder within s 300(c) of the Penal Code.

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[41] We now deal with the appellant's defence which is the appellant's second ground of appeal. It is clear from his evidence the appellant had tried to raise the defence of grave and sudden provocation. In his evidence, at p 91 of the appeal record, he said:

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Selepas dengar apa yang Sarah kata saya berasa marah dan masa itu saya telah hilang kawalan diri saya dan perasaan saya dan saya telah menikam beliau dengan pisau dalam tangan saya itu. Beliau cuba membela diri dengan cara menghalang dengan menggunakan tangan beliau dan beliau telah memecahkan cermin mata saya. Kejadian ini berlaku terlalu pantas dan saya sendiri tidak pasti kejadian yang sebenar.

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[42] Exception 1 to s 300 of the Penal Code provides that culpable homicide is not murder if the offender is deprived of the power of self control by grave and sudden provocation. It is trite law that for the appellant to succeed in his defence he must show, on a balance of probabilities, that he killed the deceased while he was deprived of the power of self control by grave and sudden provocation. Under the explanation to that Exception 1 it is stated that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

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[43] In *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229 the defence of grave and sudden provocation was argued before this court. In that case Zulkefli Makinudin JCA, after considering a number of cases on the issue, said at p 527 (MLJ); p 244 (CLJ):

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Based on the above cited case authorities it is clear that the threshold where the appellant in the present case must satisfy the court is on the balance of probabilities that the injuries that he had inflicted on the two deceased persons were as a result of grave and sudden provocation and not merely to cast a reasonable doubt on the prosecution case...

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[44] In *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 the Supreme Court made the following observation at p 253:

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The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* (7)). This test has been adopted and applied by the courts in this country ...

A [45] In his judgment the learned High Court judge held that he was unable to make a finding that the appellant had lost his self-control due to any grave and sudden provocation from the deceased. The learned High Court judge gave the following reasons:

B It is my finding that the relationship between Sarah and the accused was at all material times one of prostitute/client, and nothing more. Therefore, Sarah's alleged mocking laughter, at accused's attempt to commit suicide in her presence, cannot be considered provocation. Therefore, the issue of 'grave and sudden' does not arise. There is no reason for the accused to lose his self-control in an environment of prostitute/client relationship when a prostitute refuses his hand in marriage and laughs mockingly at him. There is no reason to be emotional over the rejection in such a relationship. Anger and loss of self-control, under such circumstances, is unreasonable, notwithstanding the fact the accused may have paid heavily in cash for her sexual services. The accused should have exercised the same degree of self-control as any other ordinary person, in a prostitute/client environment, and extend to the prostitute the security and assurance that no harm would befall her in the course of rendering her services for the fee paid.

E [46] At the end of his judgment the learned High Court judge made the following finding:

F I am satisfied the accused stabbed Sarah in a state of self-triggered irrational anger and disillusionment over her. By no stretch of imagination can Sarah's conduct, in making known to him her stand about her relationship, be it with a mocking laughter or otherwise, be construed provocation. The injuries inflicted on Sarah by the accused were intentional, and on a balance of probability, I am satisfied the accused was not deprived of any self-control, despite his assertion to that effect. In the circumstances, the defence of grave and sudden provocation cannot be availed to the accused. Since some of the injuries inflicted on her are sufficient in the ordinary cause of nature to cause death, the prosecution has proved beyond reasonable doubt that the accused is guilty of the offence of murder within s 300(c) of the Penal Code which reads: ...

H [47] It is also a trite law that an appellate court should be slow to disturb the finding of facts of the trial judge unless it can be shown that the finding of facts is not supported by the evidence or it is against the weight of evidence or that it is a perverse finding. See *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193. On evidence in this case we agree with the finding of the learned High Court judge that the alleged provocative acts of the deceased relied upon by the defence were not capable of constituting a grave and sudden provocation. The learned High Court judge had carefully evaluated the appellant evidence and made a correct finding and his finding, in our view, is clearly beyond reproach.

[48] We have carefully scrutinised the evidence and on a consideration of the entire evidence we are satisfied that the appellant was rightly convicted. For the reasons given above the appellant's appeal was accordingly dismissed and the decision of the High Court judge was affirmed.

Appellant's appeal dismissed.

Reported by Kohila Nesan

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